

No. 14719.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUSTIN J. SHELTON,

Appellant,

vs.

GUAM SERVICE GAMES, A Co-partnership,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Appellant appeals from the judgment of the court below enjoining him from engaging in the coin-operated machine business in the Territory of Guam for a period of time to and including January 31, 1959. [Tr. pp. 53-54.]

Jurisdictional Statement.

The jurisdiction of the court below was invoked under Section 22A of the Organic Act of Guam (48 U. S. C., Sec. 1424(a)), which provides in part as follows:

“The District Court of Guam shall have . . . original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature”

Jurisdiction of this court to hear this appeal is conferred by the provisions of Title 28 U. S. C. 1291.

Statement of the Case.

All of the facts in this case were stipulated to by the parties and may be summarized as follows: Appellant was the owner of a coin-operated machine business, known as the Flamingo Music and Novelty Company, in the Territory of Guam with principal office in the Municipality of Agana. On February 1, 1954, appellant and appellee entered into a written agreement whereby appellant sold to appellee all his right, title and interest in and to said business for the sum of \$50,000.00. [Tr. p. 24.] Paragraph 5 of the agreement provides as follows:

“5. SELLER hereby covenants and agrees that he will not, within the Territory of Guam, for a period of five (5) years from the date hereof, engage in the coin operated machines business, in any manner or form, whatsoever, whether as owner, partner, agent, employee or otherwise, except as an employee of the BUYER herein. It is further agreed that if the BUYER consents to hire the SELLER as an agent or employee then said BUYER will offer to the SELLER, as salary, the going normal wage usually paid to persons engaged in similar type of work in the Territory of Guam, at the time of the hiring of the employee; SELLER further covenants that he will not interfere, directly or indirectly, in any manner or form with the business of BUYER, his assignees, successors or transferees.”

Thereafter, the consideration provided for in the agreement was delivered by appellant to appellee and appellee paid to appellant the sum of \$45,000.00 and deposited in

court the sum of \$5,000.00, being the last payment due from appellee to appellant. [Tr. pp. 24-25.]

Appellant's wife, on May 10, 1954, secured a license to operate a coin-operated machine business in the Territory of Guam and thereafter operated the business in the Territory. Appellant was connected with this business from and after the inception thereof and aided and assisted his wife in the operation of the business. [Tr. p. 25.] Appellee was unable to show any actual money damages as a result of said acts. [Tr. p. 26.]

With regard to the geographic division of Guam, the parties stipulated as follows:

"10. That since the Spanish times in Guam, the Island has been geographically divided into municipalities; that attached hereto marked Defendant's Exhibit 'A,' is a map showing the historic development of such geographic municipalities; that the map entitled municipalities as of March 19, 1934, is the present geographic division of Guam into municipalities; that the Municipality of Agana is shown on said map with the red crayon caption 'Agana'; that any other crayon writing on said map shall not be considered as a part of the Exhibit; that certain areas within municipalities have been known as 'districts,' but have no geographic significance." [Tr. pp. 26-27.]

Specification of Errors Relied Upon.

(1) The court below erred in holding that appellant should be enjoined from engaging in the coin-operated machine business throughout the entire Territory of Guam.

(2) The court below erred in holding that the word "district" as contained in Section 1674 of the Civil Code of Guam should be construed as meaning any area the parties agree upon.

(3) The court below erred in holding that changed conditions made it impossible to attempt to define the word "district" as used in Section 1674 of the Civil Code of Guam.

Statutory Provisions Involved.

Civil Code of Guam:

"1673. *Contracts, restraint of trade.* Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void.

"1674. *Exception, sale of good will.* One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified district, city or part thereof, so long as the buyer or any person deriving title to the good will from him carries on a like business therein."

ARGUMENT.

Summary.

The contract restraining appellant from engaging in the coin-operated machine business throughout the entire Territory of Guam violates Sections 1673 and 1674 of the Guam Civil Code. These sections limit the maximum restraint that may be imposed to a specified district or city. The court below nevertheless held that the agreement was valid, and, accordingly, enjoined appellant from engaging in such business in the Territory of Guam. Appellant contends that the said Code sections prohibit an Island-wide restraint, and that, accordingly, he cannot be restrained from doing business in any place other than the Municipality of Agana, the principal office of the business sold by appellant to appellee.

I.

A Covenant to Refrain From Engaging in Business Throughout the Entire Territory of Guam Violates Sections 1673 and 1674 of the Civil Code of Guam.

The agreement between the parties attempted to prohibit appellant from engaging in the coin-operated machine business anywhere within the Territory of Guam. On its very face the agreement was invalid and in violation of Sections 1673 and 1674 of the Civil Code of Guam. Yet the court below would enforce the agreement to the letter.

Section 1673 declares that all contracts in restraint of trade are void otherwise than is provided in Sections 1674

and 1675. Section 1675 is immaterial herein. Section 1674 allows the seller of a business to agree "to refrain from carrying on a similar business within a specified district, city or a part thereof." In spite of this clear territorial limitation, the court below enjoined appellant from engaging in the business anywhere within the Territory of Guam.

How did the court below grant this broad injunction in the very face of Section 1674? A reading of the court's opinion [Tr. pp. 45-51] shows that the court reached this result by rewriting Sections 1673 and 1674 to express its own philosophy in the matter. Indeed, the court frankly says: "To attempt to establish legislative intent in connection with the provisions under consideration is quite useless." [Tr. p. 49.] And the court does not attempt to conceal that it is legislating when it says: "To hold otherwise would permit the defendant to violate his agreement without serving any useful purpose since changed conditions make it impossible for the court to attempt to define an area other than that agreed upon by the parties." [Tr. pp. 50-51.]

In stretching the term "district" to cover the entire Territory of Guam, the court is guilty of judicial legislation as demonstrated by the following language appearing in *Hughes v. Ewing*, 93 Cal. 414, 417, 28 Pac. 1067:

"The power to change the boundaries of the district, as well as to define them in the first instance, is of legislative origin, and whether exercised immediately by the legislature or mediately by a board of supervisors—the local legislature—is, whenever exercised, a legislative act."

Of course, it is well recognized that courts have no legislative authority and should avoid the usurpation of legislative powers. It is not a court's province in the course of construction of a statute to make or supersede legislation. A statute may not be, under the guise of interpretation, modified, amended, remade or rewritten, or given a construction repugnant to its terms.

In *City Carpet, etc., Works v. Jones*, 102 Cal. 506, 511, 36 Pac. 841, the court in construing the almost identical California statute said as follows:

“The Code introduces no new principle; it simply eliminates from the controversy arising upon such restriction the question as to what is a reasonable territorial limit, by specifically defining it, and thus preventing litigation; and in this the statute is wise and salutary, even though in certain cases, possibly in this one, it gives the purchaser less than he bought and less than he might enjoy without violating the interests of the public.”

It was the lower court's duty then to follow the territorial restraint defined by Section 1674 rather than to determine for itself the territorial limit which might appear necessary to protect the purchaser. If changed conditions in Guam necessitate, as the court suggests, a broader protection for the purchaser, the rewriting of Sections 1673 and 1674 should be left to the legislature.

II.

Had It Been the Legislative Intent to Allow Island-wide Restraints of Trade, the Statute Would Have Expressly so Provided.

The plain meaning of Sections 1673 and 1674 of the Civil Code of Guam is that a seller cannot validly agree to refrain from engaging in competition in any area other than a "specified district, city or part thereof." Had it been the legislative intent to allow an island-wide restraint, it would have been a simple matter, indeed, to have so provided.

The Civil Code of Guam, including Sections 1673 and 1674 was taken from the Civil Code of California. The Code was adopted by executive order of the Naval Government on December 28, 1933. (*United States v. Johnson* (9th Cir.), 181 F. 2d 577.) The Naval Government in adopting the California Civil Code in 1933 did not do so in any helter skelter or superficial manner. The first codification of Guam's corpus juris in 1933 was the result of a two-year labor, begun in Governor (Captain) E. S. Roots' administration under the direction of Lt. Commander (later Capt.) S. B. Robinson assigned to the project from the Navy Department. As the laws and orders were revised, they were referred to judges, attorneys and civil leaders in Guam for study and discussion. The final product had the approval of all consulted. United States Navy Report on Guam, 1899-1950, page 118.

Section 1673 of the Civil Code was copied word for word from the California Civil Code. Section 1674 is an exact copy of Section 1674 of the California Civil Code, except that the Guam version substitutes the word "district" in the place and stead of "county" contained in the

California Code Section. (The California Code sections as subsequently amended are now found in the Calif. Bus. and Prof. Code, Secs. 16600 and 16601.) Had the Guam draftsman wished to omit the territorial limitation contained in the California Code, he had open to him either one of two obvious courses. First, in copying the California Statute, he could have omitted the phrase “a specified county, city or part thereof” and substituted in lieu thereof “Island of Guam.” Secondly, and even more simply, he could have merely omitted the phrase “within a specified county, city or part thereof” and the last word of the section “therein.” In either case the legislative intent would have been clear: that there was to be no territorial limitation to an agreement not to compete.

Of course, the legislature did not so provide. It is not difficult to see why the allowable restraint was not made island-wide. First, Section 1674 is, after all, an exception to Section 1673, the latter section prohibiting every contract in restraint of trade other than allowed by Sections 1674 and 1675. If Section 1674 provided for no limitation on territorial restraint at all, the exception to the rule would have swallowed up the rule. The purchaser of a business could secure a complete restraint of trade as against the seller despite the fact that Section 1673 purports to invalidate such restraints.

Secondly, there is sound public policy for the legislature's refusal to allow island-wide restraints of trade. As the California court said in *Brown v. Kling*, 101 Cal. 295, 299, 35 Pac. 995:

“A contract restraining one from following a lawful trade or calling at all is invalid because it discourages trade and commerce, and prevents the party from earning a living.”

The necessary purport of the restrictive covenant which it is sought to enforce in the present case is that nowhere in the Territory of Guam, for five years, may appellant pursue the line of business in which he was engaged at the time the contract was executed. It is against the policy of the state or territory that its citizens should not have the privilege of pursuing their lawful occupations at some place within its borders, and that a citizen should be compelled to leave the state or territory to engage in his business and to support himself and family.

In *Lanzit v. Sefton Manf. Co.*, 184 Ill. 326, 56 N. E. 393, 395, the Illinois court had before it the question as to how far effect could properly be given to covenants not to carry on a trade or business. The covenant involved was to refrain for ten years from engaging in the business of manufacturing or selling certain paper products within the United States, the state of Indiana and the state of Illinois. The trial court entered a decree giving effect to the covenant insofar as it applied to the states of Indiana and Illinois. The court held such decree improper and called attention to the settled rule that contracts in general restraint of trade are void as being against public policy and the court in this connection said as follows:

“The effect of the contract, if enforced as decreed below, would be to deprive the public—the people of the whole state—of the industry and skill of appellant in the particular trade or business in which he may be most skillful and useful, and compel him to engage in some other business, or move to another state in order to support himself and family; in other words, to expatriate himself, so far as his citizenship of this state extends, and go beyond our jurisdiction.”

III.

The Guam Statute Being Almost Identical With the California Statute, the Court Below Should Have Given Great Weight to the California Decisions Construing the California Statute.

Since Sections 1673 and 1674 were taken almost verbatim from the California Civil Code, it is helpful to review the California decisions construing the almost identical California Code sections. As stated in *United States v. Johnson* (9th Cir.), 181 F. 2d 577, 580:

“When the appropriate authority adopted from California a code of laws designated to replace the original part—Spanish law, it might be inferred that such codified rules . . . were intended to have the same significance and scope as they have been given by the Supreme Court of the state from which the Code was taken.”

A reading of the California decisions shows that the California courts have scrupulously followed the territorial limits imposed by California Civil Code Section 1674. In each of the cases hereinafter cited the parties attempted to restrain competition in an area greater than that allowed by the statute. In each of these cases the court followed the statute rather than the intention of the parties and restricted the restraint to the area allowed by the statute. In each of these cases, therefore, the purchaser received less than he bargained for.

In *General Paint Corp. v. Seymour*, 124 Cal. App. 611, 12 P. 2d 990, the covenant not to compete provided that the seller would not “engage in the manufacturing, sale or distribution of paint or varnishes or any like products within the limits of the State of California.” The court

recognized that this territorial limit exceeded that permitted by Section 1674 of the Civil Code but held that the lower court correctly ruled the agreement was valid as far as the County of Los Angeles, the principal place of business, was concerned. The seller in *City Carpets, etc., Works v. Jones*, 102 Cal. 506, 36 Pac. 841, agreed not to engage in business in the Counties of San Francisco, Alameda and San Mateo. While the court held that the limitation was invalid as to Alameda and San Mateo Counties, it upheld the restriction as to the City and County of San Francisco, in which the property and business were located.

The California decisions are summarized in *Mahlstedt v. Fugit*, 79 Cal. App. 2d 562, 566, 180 P. 2d 777, as follows:

“If the contract is unrestricted as to the territory in which the seller agrees to refrain from competition with the purchaser of his business, or if it includes more territory than that provided by law, it will be construed to be operative within the county or portion thereof in which the business is located (citing cases)”

Section 1674 of the Guam Civil Code should likewise be construed to limit the agreement in question to the district or city in which the principal place of business is located.

IV.

Section 1674 of the Guam Civil Code Limits the Territorial Restraint Which May Be Imposed by a Covenant Not to Compete to a Geographical Subdivision of the Territory of Guam, to-wit: a Municipality or City.

We have already pointed out that had the Naval Government intended to allow an island-wide restraint of trade, it would have been a simple matter to have so provided in enacting Section 1674. It is equally significant that the government in actually enacting Section 1674 replaced the term "county" appearing in the California Code section with the term "district." The term "county," of course, represents a specific geographical subdivision of the State of California. In using the term "district" in the place and stead of "county" the government must have similarly meant to limit the allowable territorial restraint to a specific geographical subdivision of the Territory of Guam. This construction is in accord with the definition generally given to the term "district" by the courts.

"In its ordinary meaning the word '*district*' is commonly and properly used to designate any one of the various divisions or subdivisions into which the state is divided for political or other purposes and may refer either to a congressional, judicial, senatorial, representative, school or road district, depending always upon the connection in which it is used."

Olive v. State, 11 Neb. 1, 13-14, 7 N. W. 444.

“‘District’ derives its meaning from the Latin, meaning jurisdiction. The word describes a special geographical area over which specific authority, executive, legislative, or judicial is exercised by properly constituted authorities.”

Hammond v. Young, et al., 117 N. E. 2d 227, 231.

A district is “a portion of territory specifically set off or defined as for judicial, political, educational, or other purposes.”

City of Louisville, M. H. Commission v. Public Housing Admin., 261 S. W. 2d 286.

The term “district” means “a geographical part of the state.”

Rose v. Superior Ct. of Imperial County, 80 Cal. App. 739, 748, 252 Pac. 765.

The United States Supreme Court has held “district” to mean a part or portion of a state. *Kelly v. Sands*, 99 U. S. 441, 25 L. Ed. 327. In *Union Pacific v. Cheyenne*, 113 U. S. 516, 55 S. Ct. 601, 28 L. Ed. 1078, the Supreme Court held “district” signified any territorial division smaller than a county.

Taking the ordinary accepted meaning of “district” then, the plain meaning of Section 1674 is that a seller may not agree to refrain from carrying on a business other than within a specified geographical subdivision of the Territory of Guam.

The court below in defining “district” as “any area the parties agree upon” [Tr. p. 50] failed to actually define the term; that is, the court did not define the specific geographical area covered by the word “district.” In this regard the parties stipulated “That certain areas

within municipalities have been known as 'districts' but have no geographical significance." [Tr. p. 27.] It was further stipulated "That since the Spanish times in Guam, the Island has been geographically divided into municipalities . . . that the map entitled municipalities as of March 19, 1934, is the present geographic division of Guam into municipalities." [Tr. p. 26.] Since the only geographic subdivision in Guam is the municipality, the word "district" as used in Section 1674 must be defined to mean municipality.

An examination of the Government Code of Guam discloses that the terms "district" and "municipality" have been given an equivalent treatment by the legislature and that the two terms have, at least on occasion, been used interchangeably. Government Code Section 2060 (set forth in the Appendix) provides for the appointment of registration clerks for 20 separate areas therein set forth. 13 of these areas are designated as municipalities. The remaining 7 areas are designated as districts or groups of districts. Thus, municipalities and districts are treated equally in that a registration clerk is assigned to both districts and municipalities.

Section 15000 of the Government Code (set forth in the Appendix) provides for the appointment of commissioners or assistant commissioners for districts and municipalities. Again, municipalities and districts are treated equally by the legislature in the matter of local government. Moreover, it should be noted that in Section 2060 the legislature refers to Sinajana as a district. In Section 15000 it refers to the same area as a municipality [Deft. Ex. "A" shows Sinajana to be a municipality]. Clearly, in this one instance at least, the legislature has regarded the terms "municipality" and "district" to be

interchangeable. See *Acme Dairy Co. v. Astoria*, 49 Ore. 520, 523, 90 Pac. 153, where the court held “district” and “municipality” to mean the same thing, saying “The words ‘municipality’ and ‘district,’ as used in the clause of the amendment adverted to are evidently expressions of equivalent import. . . .”

Whether the suggested definition of “district” is accepted by this court or not, it is clear that in no event can the term “district” be stretched to mean the entire Territory of Guam. It was stipulated by the parties that at the time the agreement was entered into appellant’s principal office was located in the Municipality of Agana. [Tr. p. 24.] In applying Sections 1673 and 1674 to the agreement in the instant case the injunction then, should be limited in territorial restraint to the Municipality of Agana.

Conclusion.

For the foregoing reasons, we respectfully submit that the judgment of the court below should be reversed and the cause remanded with instructions to modify the injunctive portion of its judgment by limiting the restraint therein imposed to the Municipality of Agana.

Dated: July 8, 1955.

Respectfully submitted,

SPIEGEL, TURNER & STEVENS, and
GERALD G. WOLFSON,

Attorneys for Appellant.

APPENDIX.

Government Code of Guam.

Section 2060. *Registration clerks: appointment.* The Election Commissioner shall appoint a Registration Clerk for each of the following areas:

- (a) Municipality of Dededo, not including the district of Tamuning.
- (b) District of Tamuning.
- (c) Municipality of Yigo.
- (d) Municipality of Barrigada, not including the district of Mangilao.
- (e) District of Mangilao.
- (f) Districts of Sinajana and Papato.
- (g) Municipality of Asan.
- (h) Municipality of Talofofo
- (i) Districts of Paasan and Agana Heights.
- (j) Municipality of Yona.
- (k) Municipality of Agana.
- (l) Municipality of Piti.
- (m) Municipality of Agat, not including the District of Santa Rita.
- (n) Municipality of Merizo.
- (o) Municipality of Umatac.
- (p) Municipality of Inarajan.
- (q) District of Santa Rita.
- (r) Districts of Mongmong, Didigue, Toto and Jala-guac.
- (s) Districts of Chalan Pago and Ordot.
- (t) District of Maina.

Section 15000. *Apportionment.* There shall be a commissioner and/or assistant commissioner for the municipalities and villages of Guam as indicated in the following table:

<u>Area</u>	<u>Commissioner</u>	<u>Assistant Commissioner</u>
Municipality of Agana	1	0
Municipality of Sinajana (Sinajana Village)	1	1
Agana Heights (Paasan)	0	1
Chalan Pago and Ordot	0	1
Municipality of Yona	1	0
Municipality of Talofofo	1	0
Municipality of Inarajan	1	0
Municipality of Merizo	1	0
Municipality of Umatac	1	0
Municipality of Agat	1	0
Santa Rita Village	1	0
Municipality of Piti	1	0
Municipality of Asan	1	0
Municipality of Barrigada	1	1
Mangilao Area	0	1
Village of Tamuning	1	0
Municipality of Dededo	1	0
Municipality of Yigo	1	0
Mongmong, Toto, Maite	1	0
	<hr/> 16	<hr/> 5

Section 15009. *Same; duties.* A Commissioner and/or Assistant Commissioner is the direct administrative representative of the people residing in the area from which he is elected, and as such he shall perform the following duties:

- (a) Cooperate with members of the Department of Public Safety and other law enforcement agencies in the maintenance of peace, order and tranquility in the area.
- (b) Enforce such sanitary and health laws and regulations as are or may be prescribed by the government of Guam.
- (c) Maintain a census of all residents of his jurisdiction, which shall list the name, age, address, occupation, and C. I. number of each resident of his jurisdiction.
- (d) Cooperate with all officials of the government of Guam in order to promote health, education, peace and economic and social welfare of the people of his jurisdiction.
- (e) Make monthly written reports to the Chief Commissioner of Guam covering conditions in his jurisdiction with recommendations for the betterment thereof.
- (f) Supervise and coordinate the work of Assistant Commissioners of his jurisdiction.

